98th CONGRESS
1st Session

COMMITTEE PRINT

S. PRT.
98-63

TAIWAN COMMUNIQUE AND SEPARATION OF POWERS

REPORT

ON THE TAIWAN RELATIONS ACT AND THE JOINT COMMUNIQUE SIGNED BY THE UNITED STATES AND CHINA

TO THE

COMMITTEE ON THE JUDICIARY UNITED STATES SENATE

MADE BY ITS

SUBCOMMITTEE ON SEPARATION OF POWERS

JUNE 1983

Printed for the use of the Committee on the Judiciary

U.S. GOVERNMENT PRINTING OFFICE
20-235 O WASHINGTON : 1983

S522-5

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LETTER OF TRANSMITTAL

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, D.C., April 27, 1983.

HON. STROM THURMOND,
Chairman, Committee on the Judiciary,
U.S. Senate, Washington, D.C.

DEAR STROM: This is to inform you that the Subcommittee on Separation of Powers has completed its work on the United States-Red China Joint Communique of August 17, 1982, and has prepared a report of its findings to the full committee. I am therefore sending you this letter of transmittal in order to have the report printed.

You will note that the Joint Communique, which on its face amounts to a significant departure from the official United States policy set forth in the Taiwan Relations Act of 1979, has since been interpreted by the administration in such a way that its meaning generally remains within the bounds of the statute. I believe that this interpretation may be due in no small part to the accounting demanded by the public and by this subcommittee after the communique was issued.

Thanking you for your assistance to our efforts, I am

Sincerely,

JOHN P. EAST,
U.S. Senator.

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TAIWAN COMMUNIQUE AND SEPARATION OF POWERS

I. Finding

The Subcommittee on Separation of Powers of the Committee on the Judiciary, having studied the issue of whether the President violated the constitutional principle of separation of powers when he issued the United States-Communist China joint communique of August 17, 1982 (hereinafter, "joint communique" or "communique"), because the policy enunciated in the joint communique appears to be a significant departure from the statutory policy enacted by the Congress, finds that the definitive legal statement of U.S. policy concerning arms sales to Taiwan is set forth in the Taiwan Relations Act of 1979, Public Law 96–8, April 10, 1979, 93 Stat. 14, 22 U.S.C. 3301 et seq., that the statements of arms sales policy announced in the joint communique constitute an apparent change in arms sales policy from that stated in the act, but that the interpretation given by the administration to the statements of policy in the joint communique is generally consistent with the requirements of the act.

II. Background Information

(A) THE BACKGROUND OF THE TAIWAN RELATIONS ACT OF 1979

On December 15, 1978, President Carter, without any prior consultation with Congress, announced the establishment of full diplomatic relations between the United States and the People's Republic of China, to become effective January 1, 1979. In order to recognize the Communist regime on the mainland as the "sole legal Government of China," recognition which the United States had previously accorded the Chinese Government on Taiwan, the Republic of China, the United States chose to meet the three demands of the Communist regime and terminate formal diplomatic recognition of our longtime friend and ally, the Republic of China.[1]

In addition to severing official diplomatic ties with the Republic of China, the President also unilaterally denounced the 1954 Mutual Defense Treaty between the Republic of China and the United States. However, the remaining 55 or so treaties and the many other agreements and programs between the two countries were to remain in force, and the President said, "the people of our country will maintain our current commercial, cultural, trade, and other relations with Taiwan

[1] "As a result of the normalization agreement between the United States and China, the United States met Peking's longstanding 'three conditions,' the 'derecognition' of Taipei, the termination of the Mutual Defense Treaty, and the withdrawal of U.S. forces from Taiwan." "Implementation of Taiwan Relations Act—Issues and Concerns: Hearings Before the Subcommittee on Asian and Pacific Affairs of the House Committee on Foreign Affairs," 96th Congress, 1st session iv (1979) (preface by Representative Lester L. Wolff, chairman of the subcommittee); see S. Rept. No. 7, 96th Congress, 1st session 9 (1979).

through nongovernmental means." "Taiwan Communique and Separation of Powers: Hearings Before the Subcommittee on Separation of Powers of the Senate Committee on the Judiciary," 97th Congress, 2d session (hereinafter referred to as "Hearings") 156 (1982) (statement by President Carter to the Nation, Dec. 15, 1978).

Thus, while the United States was ostensibly acknowledging the position that "there is but one China and Taiwan is part of China," Hearings, at 155 (statement by President Carter, Dec. 15, 1978), and withdrawing all official, governmental recognition from the Republic of China, the President was also proposing to maintain unofficial treaty, that is, legal, relations with the same entity, now denominated "the people on Taiwan," even while establishing official governmental relations with the Communist regime on the mainland. On December 30, 1978, President Carter issued a memorandum to all departments and agencies. This memorandum said, in part:

> (C) In order to effectuate all of the provisions of this memorandum, whenever any law, regulation, or order of the United States refers to a foreign country, nation, state, government, or similar entity, departments and agencies shall construe those terms and apply those laws, regulations, or orders to include Taiwan. Hearings, at 160.

This multilevel arrangement with the governments in China was unique and needed legitimization by Congress.[2] To accomplish this, the administration proferred legislation, H.R. 1614 and S. 245, "to promote the foreign policy of the United States through the maintenance of commercial, cultural, and other relations with the people on Taiwan on an unofficial basis."

The administration proposal, however, encountered immediate widespread criticism. While the administration bill responded more or less directly to the concern of the business community that the stability of our commercial intercourse with Taiwan would be undermined by the abrogation of treaties and agreements other than the defense pact, the bill was roundly criticized in Congress and elsewhere for failing to provide adequately for the security needs of our longtime allies on Taiwan and thereby for the security and peace of the entire region.[3]

The administration defended its proposal by assuring Congress that the term "other relations" appearing in the proposed legislation was intended to include military and security relations. However, Congress believed that some more explicit statement of our commitment to the security of Taiwan was necessary, especially in light of Vice Premier Deng Xiaoping's repeated refusal to rule out the use of force to reunite Taiwan and the mainland.[4]

Accordingly, an alternative version of the Taiwan implementing legislation (H.R. 2479) was substituted for the administration bill, was approved by Congress, and was signed into law by the President. This law, known as the Taiwan Relations Act of 1979, clearly and directly addresses the vital question of America's moral and strategic commitment to Taiwan's security as well as addressing the problem of insuring so far as possible the stability necessary to foster commercial relations between our country and the Republic of China.

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[2] S. Rept. No. 7, 96th Congress, 1st session 41 (1979).
[3] See S. Rept. No. 7, 96th Congress, 1st session 7–8 (1979); H. Rept. No. 26, 96th Congress, 1st session 4–5 (1979).
[4] See S. Rept. No. 7, 96th Congress, 1st session 10–17 (1979); H. Rept. No. 26, 96th Congress, 1st session 5–6 (1979).

(B) PERTINENT PROVISIONS OF THE TAIWAN RELATIONS ACT

The act sets forth America's policy on arms sales to Taiwan and the means of implementing that policy. Whereas the administration's proposal subsumed the question of our continuing commitment to Taiwan's security under the term "other relations," [5] the findings of the Taiwan Relations Act announce immediately and unmistakably our fundamental concern with the security of Taiwan:

SEC. 2. (a) The President having terminated governmental relations between the United States and the governing authorities on Taiwan recognized by the United States as the Republic of China prior to January 1, 1979, the Congress finds that the enactment of this Act is necessary—

(1) to help maintain peace, security, and stability in the Western Pacific; * * *

The act then establishes the policy of the United States in this regard:

SEC. 2. (b) It is the policy of the United States—

(2) to declare that peace and stability in the area are in the political, security, and economic interests of the United States, and are matters of international concern; * * *

(5) to provide Taiwan with arms of a defensive character; * * *

Section three of the act implements the policy set forth above by mandating the supply of arms and services to Taiwan and requiring the President and Congress to determine jointly the quality and quantity of such arms.

SEC. 3. (a) In furtherance of the policy set forth in section 2 of this Act, the United States will make available to Taiwan such defense articles and defense services in such quantity as may be necessary to enable Taiwan to maintain a sufficient self-defense capability.

(b) The President and Congress shall determine the nature and quantity of such defense articles and services based solely upon their judgment of the needs of Taiwan, in accordance with procedures established by law. Such determination of Taiwan's defense needs shall include review by United States military authorities in connection with recommendation to the President and Congress.

In sum, the Taiwan Relations Act clearly expresses the intent of Congress regarding (1) the maintenance of Taiwan's defensive capability and security, (2) the joint determination by the President and Congress of matters regarding the commitment of the United States to the security of Taiwan, and (3) the continued stability of our commercial relations with Taiwan detailed elsewhere in the act.

(C) THE UNITED STATES-RED CHINESE JOINT COMMUNIQUE OF AUGUST 17, 1982

On August 17, 1982, the President and Communist China issued a joint communique, the main purpose of which was to address the issue of the continuing United States arms sales to Taiwan. This issue was dealt with in the framework of the "reaffirmation" of "the fundamental principles which have guided United States-China relations since the inception of the normalization process over 10 years ago." Hearings, at 178 (statement by John H. Holdridge, Assistant Secre-

[5] "Taiwan: Hearings on S. 245 Before the Senate Committee on Foreign Relations," 96th Congress, 1st session 23–24 (1979) (testimony of Warren Christopher, the Deputy Secretary of State).

tary of State for East Asian and Pacific Affairs before the House Committee on Foreign Affairs, Aug. 18, 1982). The "fundamental principles" cited in the communique refer to the problem of defining Taiwan's legal relationship to the Government of the mainland—the so-called Taiwan question.

The question of the legal relationship between Taiwan and the Communist government has haunted our negotiations with the Communist regime from the beginning. In the 1978 negotiations which led to the normalization of relations with the Peking government, the Communist regime agreed that the United States would "maintain cultural, commercial, and other unofficial relations with the people of Taiwan." Hearings, at 155 (statement by President Carter, Dec. 15, 1978); see also Hearings, at 178 (joint communique, par. 1). However, the Communists demanded that arms sales to Taiwan cease. According to Assistant Secretary Holdridge:

> During discussions leading to normalization, China demanded that arms sales be terminated. We refused. I can say here that our negotiations almost foundered over this issue. China ultimately agreed to proceed with normalization despite this disagreement but reserved the right to raise this issue again. When it did so, we agreed to engage in discussion to determine whether an understanding could be reached. Hearings, at 178.

The discussion anticipated by the two parties in 1978 began in 1981, ten months before the issuance of the joint communique. Again, according to Assistant Secretary Holdridge, the Communist Chinese demanded that "we agree to ultimate termination of arms sales," and again we refused:

> We refused because the level of our arms sales must be determined by the needs of Taiwan and we could not agree to a termination date, as the Chinese demanded, which might impair our ability to meet those needs. Hearings, at 179.

However, the administration did find it significant that twice since the announcement of normalization of relations in December 1978, the Communist government announced a "fundamental policy" of peacefully resolving the Taiwan question. With the announced intentions of the Communist regime in mind,[6] the administration stated its own intentions regarding arms sales in paragraph 6 of the joint communique:

> 6. Having in mind the foregoing statements of both sides, the United States Government states that it does not seek to carry out a long-term policy of arms sales to Taiwan, that its arms sales to Taiwan will not exceed in qualitative or in quantitative terms, the level of those supplied in recent years since the establishment of diplomatic relations between the United States and China, and that it intends to reduce gradually its sales of arms to Taiwan, leading over a period of time to a final resolution. In so stating, the United States acknowledges China's consistent position regarding the thorough settlement of this issue. Hearings, at 178.

It is this language of the joint communique, when juxtaposed to the sections of the Taiwan Relations Act setting forth U.S. policy regard-

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[6] The Peking Government disagrees with the United States on this point. Whereas the U.S. position has been that the statements in paragraph 6 of the communique are premised on Red China's statement of its intent to pursue a policy of peaceful reunification of Taiwan and the mainland, the Red Chinese maintain that the statements in paragraph 6 are premised on the "principles governing the relations between the two countries," and that the policy it chooses to pursue in the effort to reunify the two parts of China "is purely China's internal affair, no misinterpretation or foreign interference is permissible." Hearings, at 194–95 (statement by the Communist Chinese Ministry of Foreign Affairs, Aug. 17, 1982).

ing arms sales to Taiwan and the implementation of that policy, that gives rise to the serious separation of powers issues that the subcommittee has studied.

III. Subcommittee Action

The subcommittee held 3 days of hearings. On September 17, 1982, oral testimony was received from:

Hon. Steven D. Symms, U.S. Senator from Idaho;

Hon. Richard Stone, former U.S. Senator from Florida and cosponsor of the Taiwan Relations Act of 1979;

Dr. Ray Cline, Georgetown Center for Strategic and International Studies;

Ambassador Leonard Unger, former Ambassador to the Republic of China;

Prof. A. James Gregor, Institute for International Studies, University of California at Berkeley; and,

Prof. Harold Hinton, George Washington University.

The witnesses testifying at the September 27, 1982, hearing were Davis Robinson, Esq., Legal Adviser, Department of State, and Theodore Olson, Esq., Assistant Attorney General, Office of Legal Counsel, Department of Justice. The Honorable Paul D. Wolfowitz, Assistant Secretary of State for East Asian and Pacific Affairs, testified at the final hearing on March 10, 1983. See Hearings, part 2, for March 10 transcript.

In addition to the testimony of these distinguished witnesses, the subcommittee received written testimony from the following individuals:

Hon. Barry Goldwater, U.S. Senator from Arizona;

Hon. Gerald Solomon, U.S. Representative from New York;

H. O. Reinsch, president, Bechtel Power Corp.;

David M. Kennedy, chairman of the board, and W. N. Morell, Jr., president, USA–ROC Economic Council;

Prof. Morton A. Kaplan, University of Chicago.

IV. Preliminary Statement of the Issue

The issuance of the joint communique by the President of the United States and the Government of Communist China presents the problem of a possible violation of the separation of powers principle which underlies the U.S. Constitution. Congress, the legislative or policymaking branch of the National Government, declared the U.S. policy regarding arms sales to Taiwan in the Taiwan Relations Act, and according to the American constitutional scheme of government the President as the chief executive officer is charged with the duty to carry out the statutory policy of the Nation. However, the U.S. policy statements in the joint communique, and in particular in paragraph 6 of the communique, appear to deviate considerably from the policy set forth in the act.

If the communique does in fact purport to state official U.S. policy, and if that policy does in fact depart from the statutory policy, then the departure presents a prima facie case of failure by the President to execute faithfully the laws of the United States and also a

case of his unauthorized making of the U.S. policy instead of executing it. Both of these possibilities are violations of the principle of separation of powers, because each branch of the National Government is charged with the duty to exercise certain powers and not to exercise others. It is the function of the executive branch to administer lawful U.S. policies and not to formulate policy which ignores or purports to supersede U.S. law.

Therefore, the separation of powers issue may be reduced to two questions: first, "What is the legal and political nature of the joint communique?" and second, "Is the policy stated therein a legally significant departure from the policy set forth in the Taiwan Relations Act?" Since the separation of powers issue presupposes that the Congress acted constitutionally when it enacted the Taiwan Relations Act, the study of the problem must begin with an analysis of the constitutional basis of the legislation.

V. The Constitutionality of the Taiwan Relations Act

Neither the administration nor critics from other quarters have questioned the constitutional validity of the act. The statements by President Reagan and by Assistant Secretary Holdridge which accompanied the announcement of the joint communique on August 17, 1982, specifically acknowledged the overriding authority of the act as regards U.S. arms sales policy toward Taiwan. Hearings, at 179. Subsequent statements by Assistant Secretary Powell Moore and by Legal Adviser Davis Robinson of the Department of State as well as the answers by the Department to the written interrogatories propounded by the subcommittee reiterated the position of the administration that the Taiwan Relations Act is the law of the land and that the joint communique is fully consistent with the act. Hearings, at 96, 145–46, 182–83.

Most recently, Assistant Secretary Paul Wolfowitz repeated this position at the March 10, 1983, hearing:

> I seek only to fulfill the President's personal commitment to implement our policies, including the Joint Communique in a manner fully consistent with U.S. law, including the Taiwan Relations Act. . . . Let me say in my own words that it is correct that the administration believes that and insists that our policies will be consistent with the Taiwan Relations Act. "Taiwan Communique and Separation of Powers—Part 2: Hearings Before the Subcommittee on Separation of Powers of the Senate Committee on the Judiciary" (hereinafter, "Hearings, part 2") 7, 12 (1983).

The Taiwan Relations Act may be grounded on either of two constitutional foundations. The first and most obvious basis is the power of Congress "to regulate Commerce with foreign Nations," article I, section 8, clause 3 of the Constitution. The establishment of policy regarding the peacetime sale of arms and services to the people on Taiwan is an exercise of this constitutional power.

It may be objected, however, that the derecognition of the Republic of China together with the affirmation that there is only one China and that the Peking government is the sole legal government of China consigns Taiwan to something other than "nation" status. Far from detracting from the constitutional validity of the Taiwan Relations

Act, this latter account of the nature of the legal entity which is Taiwan served the Senate Committee on Foreign Relations as the premise for its constitutional justification of the act:

> While it is true that the President has some "constitutional responsibility for the conduct of the foreign relations of the nation," it is not true that he possesses all powers granted by the Constitution to do so; his exclusive authority to recognize and to negotiate with foreign governments has never been construed as having in any way narrowed or diminished the many powers of the Congress over foreign affairs matters, including the power to regulate commerce with foreign nations (art. I, sec. 8, cl. 3), to spend for the general welfare (art. I, sec. 8, cl. 1), and to control Federal expenditures (art. I, sec. 9, cl. 7). It is these powers upon which many of the provisions of this bill are based, and it is the Committee's judgment that the enactment of these provisions is legally required—not simply politically desirable, but legally required—if the President is to be enabled to continue to conduct the myriad programs concerning Taiwan. The reason is that the statutes authorizing such programs invariably authorize the President to carry out those programs only with respect to foreign countries, nations, or states, and the President, on December 19, stated that, as of January 1, 1979, "Taiwan will no longer be a nation in the view of our own country." S. Rept. No. 7, 96th Congress, 1st session 41 (1979). See also Hearings at 13 (statement of Richard Stone).

On the basis of the foregoing arguments, the subcommittee finds that the Taiwan Relations Act is clearly a legitimate exercise of the legislating power of the Congress under the Constitution.

VI. The Legal and Political Nature of the Joint Communique

The administration insists that the joint communique is not an executive or international agreement giving rise to legal rights and legal obligations. Hearings, at 109–10 (statement of Davis Robinson). The Congress has been told by former Assistant Secretary Holdridge that it is a "modus vivendi," an "understanding," and "a statement of future U.S. policy"; Legal Adviser Robinson stated that it is "a statement of policy," "a statement of intention," and "a statement of expectations"; and present Assistant Secretary Wolfowitz testified that it is "a framework for managing our differences with the Chinese over a matter of great sensitivity to us both." In his testimony before the subcommittee, Mr. Robinson, the chief legal counsel to the Department of State, described the communique at some length:

> At the outset, it is important to define with precision the legal character of the August 17 communique. It sets forth parallel and interrelated statements of policy by the United States and China. It is not an international agreement and thus imposes no obligations on either party under international law. Its status under domestic law is that of a statement by the President of the United States of a policy which he intends to pursue. Like any other Presidential policy, it must be executed in full compliance with all relevant laws. The President has made clear his firm intention to do so.
>
> It is beyond question that the President possesses full constitutional authority to issue statements of the foreign policy which he intends to pursue. Such statements of the Executive's policy are recognized as being at the heart of the Executive's prerogatives in the conduct of U.S. foreign relations. The communique is an example of such a statement of policy and that is clearly within the authority of the President.
>
> The issuance of the communique did not encroach on any constitutional or statutory power of the Congress. The chairman's August 20 and 24 letters suggest that the Taiwan Relations Act limits or otherwise regulates the President's authority to issue expressions of Executive policy with respect to Taiwan in the absence of some action by the Congress. Upon careful further consideration,

I have reconfirmed our earlier conclusion that the act imposes no requirements upon the President that have not been satisfied. Hearings, at 95.

This characterization of the joint communique by the administration poses at least two problems. First, although the Department of State spokesmen emphatically refuse to describe the joint communique as a "legal" agreement, the subcommittee notes that the distinction between "legal" and "nonlegal" or "political" agreements among nations often has little real significance. This is especially true in that area of international relations concerned with strategic and military arrangements, the area into which fit both the joint communique and United States-Taiwan arms sales agreements. It is seldom anticipated by the parties to these agreements--whether the agreements are denominated "understandings," "modi vivendi," or "parallel statements of policy"—that the rights and obligations established thereby will be tested in domestic courts or international tribunals.

Thus, it is not the "legal" in the sense of the "justiciable" character of the communique but its "legal" character as determined by our fundamental law, the U.S. Constitution, that is of primary concern to the subcommittee. This concern by Congress is also warranted because the Federal judiciary, in all likelihood, would refrain from adjudicating the instant constitutional questions posed by the joint communique, holding instead that the issues are "political questions" to be resolved between the executive and legislative branches through the political processes set forth in the Constitution. Of course, even if the courts did exercise jurisdiction, the Congress, as a coequal branch of the national government and trustee of our fundamental law, is empowered and obligated to investigate any colorably constitutional issues resulting from actions by the executive branch and to determine for itself the nature of the problem and the best remedial steps to take.

The present controversy also points to the inseparability of law and policy in the statements given and the actions taken in the management of the Nation's foreign affairs. See Hearings, at 111–14. In order to determine whether the joint communique is a proper and legal exercise of executive branch power, the Congress must be able to determine the actual policy which is reflected in the joint communique or which the communique is intended to justify. Therefore, both because of this inseparability of law and policy and because it is the function of Congress to set both the domestic and the foreign policy of this Nation, the subcommittee must inquire into the policy actually being pursued by the President and into the political nature of the agreements our country enters and the nature of the rights and obligations acquired thereby.

The Department of State concedes that the joint communique does indeed create obligations of a nonjusticiable or political type:

While the communique may not be an international legal agreement enforceable in courts of law, is it not the case that the communique is intended to create certain reasonable expectations by each party? Hearings, at 131–32 (interrogatory No. 26).

Yes, while the joint communique is not an international agreement, it contains parallel statements by the United States and the People's Republic of China of policies which our respective Governments intend to pursue. Such a document may create reasonable expectations by each party. On our part, we expect the Chinese to maintain their policy of seeking a peaceful resolution of their differences with Taiwan. Hearings, at 146 (answer No. 26).

Assistant Secretary Holdridge, in his August 17, 1982, testimony before the Senate Committee on Foreign Relations, expressed concisely the political nature of the joint communique:

> We have come to an agreement—not an agreement but an understanding with the People's Republic of China, and I think they expect us to carry it out in good faith as we expect them to carry out in good faith the commitment to carry out a fundamental policy of working toward the peaceful resolution of the Taiwan question, so there is an obligation on both sides. Hearings, at 131 (quoted in interrogatory No. 26).

And, in his March 10, 1983, testimony before the subcommittee, Assistant Secretary Wolfowitz also referred to the "agreement" aspect of the communique when, on at least two occasions, he referred to the "formula agreed to in the joint communique," Hearings, part 2, at 9, 11, and when he stated that the administration "intends to comply with the policies as expressed in the August 17 communique," and that "[w]e fully expect the Chinese to do the same." Hearings, part 2, at 9. The subcommittee submits that there is a very fine line, easily blurred, between an "agreement" between nations and an "understanding" or "modus vivendi." It is not clear that the Department of State has always kept this distinction firmly in sight.

Since the communique was first announced, the Communist Chinese have markedly emphasized its nature as an "agreement" and also emphasized the obligations it imposes upon the United States, even while they deny that the communique records the "commitment" adduced by Assistant Secretary Holdridge. See below, p. 17. Red China has repeatedly characterized the U.S. statements as "commitments," "undertakings," and "principles" to be adhered to by the United States. As shall be pointed out in the next section of this report, this is not the only area of deep disagreement between the United States and Red China in the interpretation and very conception of the joint communique.

The description of the joint communique as a "statement of policy" intended to encourage significant reliance by each of the parties involved points to a second problem presented by Legal Adviser Robinson's statement—the question of what the administration means by "statement of policy." Of this second problem, the explanations offered by the Department of State do little to assist the subcommittee.

In the foregoing testimony of Mr. Robinson, he refers to the "legal character" of the communique as:

—"parallel and interrelated statements of policy by the United States and China;"
—"a statement by the President of the United States of a policy which he intends to pursue;"
—"statements of the foreign policy which he intends to pursue;"
—"statements of the Executive's policy;" and,
—"expressions of Executive policy." Hearings, at 95.

Such statements are "at the heart of the Executive's prerogatives in the conduct of U.S. foreign relations," but the policy "must be executed in full compliance with all relevant laws." Id. (Mr. Robinson's statement is almost identical to the statement in the letter of Sept. 14, 1982, from Assistant Secretary Powell Moore to Chairman East. Id., at 182.)

If all that is meant by the Executive prerogative asserted here by the Department is the President's discretion to publish or to rearticulate

U.S. policy where, as here, that policy has been definitively expressed in legislation, the subcommittee finds the assertion unexceptionable. The standard applicable to presidential publication is simply that of accuracy in the restatement of lawful, U.S. policy, and the function of the subcommittee is to determine whether the statements in the joint communique are accurate restatements of the policy set forth in the act.

However, two things cast doubt on this interpretation: first, the use of the terms "Executive's policy" and "policy which the President intends to pursue" rather than the term "U.S. policy"; and, second, the marked difference in the apparent substance of the policy statements in the joint communique from the substance of the policy declared in the Taiwan Relations Act. These facts intimate that the Department has in mind something different from mere rearticulations of the policy stated in the Taiwan Relations Act. Unfortunately, the replies of the administration to questions by the subcommittee do not clarify what this difference is.

In response to questioning by the subcommittee at the hearing on September 27, 1982, the representatives of the administration had this to say:

> Mr. ROBINSON. . . . I want to emphasize that the joint communique is not a legally binding international agreement creating obligations and rights under international law. It is a statement of policy. It is a statement of intention. It is a statement of expectations. It is based upon understandings. *Certainly a communique of this nature cannot bind any future President of the United States.*
>
> On the other hand, *it is a statement of the policy of this administration.* . . .
>
> * * * * * * *
>
> Mr. OLSON. . . . As Mr. Robinson stated, *the incumbent President, in making a statement of policy, could not bind his successors, and neither this President nor any successor can change the Taiwan Relations Act.* As you have pointed out, it is an enactment of this body, and only this body can change it. The implementation of the United States-China joint communique, which is a statement of policy, must be in accord with the Taiwan Relations Act. Hearings, at 109–10 (emphasis added).

In contrast to this testimony which maintains that the validity of the policy statement of the joint communique is coextensive with the tenure of the administration of Ronald Reagan, the Department of State elsewhere has sought to identify the statements in the communique as the U.S. arms sales policy. Thus, in answer to interrogatories which asked "the nature of the policy called 'executive's policy' or 'policy of the President'" and whether "such policy [is] distinct from official U.S. policy," the Department responded:

> 20. The "policy of the President" is the policy which the President adopts in the exercise of his constitutional and statutory authority. Such policy is the policy of the United States. As noted [in the responses to previous interrogatories], the policies of the United States expressed in the joint communique are fully consistent with the Taiwan Relations Act, and the President has clearly stated his intention of implementing those policies in a manner consistent with U.S. law.
>
> 21. As stated in response to Question 20, there is no distinction between the policy of the President (or Executive) and the policy of the United States concerning U.S. arms sales to Taiwan. Hearings, at 145.

The problem posed by the latter account is that the official U.S. policy concerning arms sales to Taiwan is declared in the Taiwan Relations Act and is not coterminous with the tenure of this or any other administration unless and until the act is amended by Congress. This

is clearly expressed in Assistant Attorney General Olson's testimony.

In an effort to determine the administration's conception of the nature of the policy statements in the communique, the subcommittee finds that the statements of the Department of State support the following inference. The joint communique is a formulation of the means by which this particular administration intends to implement the policy of the Taiwan Relations Act. According to this explanation, the act "enunciates in general terms the policy of the United States," Hearings, at 145 (answer No. 22), or embodies the principles of U.S. policy, Hearings, at 110 (Mr. Olson quoting earlier testimony of Assistant Secretary Holdridge), while the joint communique, pursuant to section 3 of the act, articulates the formula for implementing the general policy. Hearings, at 145 (answer No. 22); Hearings, part 2, at 9, 11 (statement of Assistant Secretary Wolfowitz).

Ignoring for the moment the fact that the Taiwan Relations Act does not delegate to the President alone the task of formulating the steps needed to implement the policies declared in section 2 of the act,[7] this account of the statements in the joint communique as a pronouncement of the means by which this administration intends to carry out the general principles in section 2 has the virtue of tying together the above and other statements of the Department. Thus, this formulation of the steps which this administration intends to take in order to carry out the policy in the Taiwan Relations Act (1) would not necessarily bind other administrations, (2) would be U.S. policy, though not in the same sense as the policy declared in the act, and (3) would be governed by the act and would have to be consistent with the statements of policy in the act.

What obscures this explanation is the failure of the Department of State to distinguish explicitly the provisions in the joint communique as statements of means from the provisions in the act as statements of objectives. The danger in this failure is that some may forget that it is the Congress, not the executive branch, that has the constitutional function of formulating U.S. foreign policy. Because of this plenary power of making policy, the Congress prescribes the specific policy-making functions of the Executive. Congress may indeed delegate considerable discretion to the President in the area of foreign affairs, but such delegation cannot be found in the Taiwan Relations Act. It becomes misleading, then, to speak of "Executive's policy" as identical with "U.S. policy," especially in this case where the Congress has exercised its constitutional power of declaring U.S. policy in a duly enacted piece of legislation. There is certainly a sense in which the steps intended to implement the policy declared in legislation may also be considered "U.S. policy," but there is also a sense in which they may not: this latter sense has been obscured by the various statements of the Department of State spokesmen.

There is a further problem with all of the explanations of the nature of the joint communique by the Department of State, and that is the problem of the authority of the executive branch to formulate unilaterally any policy whatever regarding arms sales to Taiwan. Apart from

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[7] Section 3(b) of the Taiwan Relations Act states in part: "The President and the Congress shall determine the nature and quantity of such defense articles and services based solely upon their judgment of the needs of Taiwan, in accordance with procedures established by law."

the statement by a member of the Committee on Foreign Relations that the process leading to the creation of the joint communique had been a "model" of executive branch-legislative branch cooperation, the express statements of other members of Congress during the hearings of August 17 and 18, 1982, and the inferences reasonably drawn from their questions to the representatives of the Department of State during those hearings indicate rather clearly that many members of the Senate and the House did not believe that the joint determination mandated by section 3(b) of the act did in fact occur.[8]

In sum, the subcommittee finds that the Department of State has not offered consistent, intelligible accounts of either the legal and political nature of the joint communique or the nature of the policy stated therein. In drawing the inferences stated above, the subcommittee concludes that the administration may well have exceeded the bounds of its statutory duty set forth in section 3 of the Taiwan Relations Act insofar as it acted unilaterally in formulating implementary policy. Nevertheless, the primary issue is whether the policy reflected in the communique is in fact consistent with the declarations of the Taiwan Relations Act. This issue is the subject of the following section.

VII. The Policy Stated in the Joint Communique

The controversy provoked in this country by the joint communique focuses almost exclusively on the statements of the United States found in paragraph 6:

> 1. The United States does not seek to carry out a long-term policy of arms sales to Taiwan;
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> 2. United States arms sales to Taiwan will not exceed, either in qualitative or quantitative terms, the level of those supplied in recent years since the establishment of diplomatic relations between the United States and China; and,
>
> 3. The United States intends to reduce gradually its arms sales to Taiwan, leading over a period of time to a final resolution.

It is difficult to square these statements of policy with either the statement in section 2 of the Taiwan Relations Act that it is U.S. policy "to provide Taiwan with arms of a defensive character" or the statements in section 3 of the act outlining the means by which the U.S. policy is to be implemented.

In the first statement the United States appears to declare its intention to terminate arms sales to Taiwan at some time before the "long term;" the Taiwan Relations Act, however, place no temporal limits on our policy of making such sales. The intention to terminate arms sales seems also to be reflected in the third statement: a gradual reduction of arms sales leading to a "final resolution" is a statement most reasonably construed to mean a gradual reduction leading to eventual termination. This, indeed, is the interpretation that the Red Chinese have given to the statement since August 17, 1982. The act, however,

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[8] Assistant Secretary Wolfowitz sought to reassure the subcommittee on this point: "You expressed in last fall's hearings your fear that Congress, which had asserted its voice in the Taiwan Relations Act, might be deprived of its policymaking function. Clearly, this is not and will not be the case. I say this confidently not because I understand the legal impediments, but because I understand Congress [sic] desire to assure the well being of the people of Taiwan expressed in the act to be reflected fully in the President's own wishes." Hearings, part 2, at 7.

says nothing about gradual reductions of arms sales: the level of arms sales is to be determined solely on the basis of Taiwan's defensive needs (section 3).

In statement two, it is declared that our arms sales to Taiwan will not exceed the highest levels of quality and quantity since the establishment of diplomatic relations between the United States and Red China, but again there is no foundation in the act for qualitative and quantitative caps on arm sales.

The interpretation given these policy statements by the Peking government serves to confirm the inferences drawn by the witnesses and the subcommittee. On August 17, 1982, in a statement accompanying the issuance of the joint communique, the Chinese Ministry of Foreign Affairs cited the policy statements in question and noted, "The final resolution referred to here certainly implies that the U.S. arms sales to Taiwan must be completely terminated over a period of time." Hearings, at 194. Again, on October 10, 1982, a Red Chinese commentary stated:

> The joint communique of the Chinese and U.S. Governments stipulated the principle of a phased and eventually complete solution to the issue of U.S. arms sales to Taiwan, that is, the United States must gradually reduce its arms sales to Taiwan and completely halt them after a time. Hearings, at 205.

The Department of State, however, denies that termination of arms sales was agreed to in the communique or was even contemplated by the United States, and the Department explicitly rejects the Red Chinese interpretation. Hearings, at 127 (interrogatory No. 16) and 143 (answer No. 16). The Department states:

> As noted above, the term "final resolution" refers to a resolution of the differences between the U.S. and China on the question of U.S. arms sales to Taiwan. The Communique does not pro ide for termination of such arms sales and does not specify the time or form that a resolution of these differences might take. Hearings, at 142–3 (answer No. 15(c)).

Assistant Secretary Powell Moore, in response to a letter addressed by the chairman of this subcommittee to Secretary Shultz, also made this point:

> With regard to your concern that the Communique implies a commitment on the part of the U.S. to a termination of U.S. arms sales to Taiwan, I can assure you that the Communique mandates nothing of the sort. Rather, the Communique sets forth a policy regarding future arms sales to Taiwan which is premised on an assessment of Taiwan's defense needs, the standard established in Section 3 of the TRA. Hearings, at 188.

And President Reagan, in a recently published interview, stated:

> If the day ever comes that those two [Taiwan and Red China] find that they can get together and become one China, in a peaceful manner, then there wouldn't be any need for arms sales to Taiwan. And that's all that was meant in the communique. Nothing was meant beyond that. We're not going to say, "Well, just as time goes by, we're going to reduce the arms to them." No, we hope for a peaceful resolution of this issue. Hearings, part 2, at 58.

This was reiterated by Assistant Secretary Wolfowitz in his testimony:

> While we do not seek to carry out a long-term policy of arms sales to Taiwan, we did not agree to set a date for ending arms sales, nor did we agree to consult in advance with the PRC on arms sales to Taiwan. And I would again like to emphasize very clearly, there is no time limitation in that communique. We do

not accept such a time limitation. As the President has made clear in his remarks, we do not necessarily accept the interpretation that a final resolution of the arms issue would necessarily mean a termination. Clearly, movement toward resolution of that issue is going to depend on how the Chinese themselves on both sides of the Strait move toward resolution of their own differences. Hearings, part 2, at 11–12.

Regarding the gradual reduction of arms sales and the caps on the quality and quantity of arms sold, the administration also maintains that the correct interpretation of the communique represents a policy position that is consistent with the Taiwan Relations Act. On October 6, 1982, President Reagan declared that there has been "no reversal on our Taiwan policy," that "our Taiwan friends are going to continue to get everything they need for their own self-defense," and further:

if the People's Republic keeps their word that they, for the first time, said that they would try to resolve their differences peacefully and arrive at a peaceful reunification, yes, then there would be no longer any need for us to provide defense weapons, and there would be a decline and an end at that time, but only linked to that promise of a peaceful reunification. Hearings, at 181 (remarks by President Reagan to Republican candidates).

Again, in an interview published on February 26, 1983, President Reagan was asked:

Question. But what if there is, say, progress of a sort, mild progress of a sort, but the Mainland feels that it has a sovereign right to increase and modernize its military arsenal? What happens at that point to Taiwan? Do we still go along with the idea that their military cannot be upgraded?

Answer. No, we're doing all the things that we have always done. The shipments are regularly going on. Hearings, part 2, at 58.

Later in the same interview, President Reagan was again asked about our ability to upgrade Taiwan's defenses in light of the joint communique:

Question. But the key point is, are we allowed to upgrade Taiwan's defenses, especially if the Mainland upgrades its defenses? The Taiwanese, I was told, are not even allowed to get certain defensive weapons from us because these defensive weapons hadn't gone to them prior to the issuance of the Communique.

Answer. We're giving them what we mutually agree upon when their people come here and sit down and go over their defense needs, and, as the Taiwan Relations Act requires, we will continue to address their capabilities and their needs dependent on the situation in the region. Hearings, part 2, at 58.

Secretary of State Shultz reiterated this earlier this year:

I think what is said in the communique simply describes that following the statement made on the Chinese side that the situation is peaceful but the level of arms needed basically is a reflection of the conditions that exist. If there is a peaceful situation, one could expect the level of armaments to decline, but that doesn't change our commitment that any resolution of the issues would be by peaceful means. Hearings, part 2, at 57.

And Assistant Secretary Wolfowitz testified quite clearly on this point:

We quite logically recognize the direct relationship between Taiwan's defense needs and China's peaceful policy, and in this context agree to reduce gradually the quantity and quality of our arms supplies to Taiwan. * * * Hearings, part 2, at 11.

As I see it, the standard for judging the flow of military equipment to Taiwan under the TRA is Taiwan's defense needs. We expect that so long as China maintains its nonthreatening posture toward Taiwan in accordance with the policies we set down in the communique, Taiwan's defense needs will gradually

diminish. I, therefore, believe the communique to be consistent with the Taiwan Relations Act as we determined should be the case. As the President has asserted, we do not seek any revision of the Taiwan Relations Act. Hearings, part 2, at 12.

Finally, regarding the limits on the quality and quantity of arms sold to Taiwan, the administration has recently indicated that here, too, the apparent meaning of the statement in the joint communique is not the actual or intended meaning. At the March 21, 1983, daily press briefing at the Department of State, a Department spokesman responded to questions about projected amounts of arms sales for fiscal years 1983 and 1984:

Question. All right . . . [the Communist Chinese] said [the projection], in effect, is a reneging on the implied or explicit promise by the United States to have a diminished supply of arms going to Taiwan. Would you comment on that?

Answer. Let me just say this on that: First, as I say, the figures are projections, and may not be realized in the course of the fiscal year which are cited. The figures which are cited in that document are $800 million for FY–83 and $780 million for FY–84.

Question. The second figure?

Answer. $780 M. Should these levels be realized, they would be fully consistent with the August 17 communique. As the communique says, the reductions will be gradual, and, although there may be occasional fluctuations, the trend will be apparent over time. As the Secretary has said, we intend to keep our commitments.

There are various tables which explain how figures for past years might be adjusted to bring them up to '83 levels in terms of this year's dollars to make comparisons and so on, and that's in [the Congressional Presentation: Security Assistance Programs, FY 1984].

Question. You're saying that the figures are consistent with the Taiwan Communique—with the communique of August 17, and the People's Republic says they're inconsistent, and that's the way you're going to leave it at this point?

Answer. I can't speak for the Chinese. They have to speak for themselves on this issue.

Question. They have spoken for themselves.

Answer. Fine. I am saying to you that, yes, we view these as consistent with the August 17 communique.

Question. It sounds like from that you're saying is you have adjusted the previous sales figures for Taiwan by an inflation factor.

Answer. That's right. We haven't adjusted it, but there is provided in the Congressional Presentation Document a table which would give you an inflation index.

Question. Why, then did not the commitments say we will supply less arms adjusted for inflation?

Answer. Don, as you know, we haven't tried to get as specific as that. As John Holdridge said before the Senate Foreign Relations Committee in August, we had no figures in mind of any dollar limit. We haven't gotten to that sort of specificity. See also Hearings, part 2, at 61.

Thus, it appears that the administration is interpreting the communique to permit the increase in the actual current dollar amounts of arms sales in order to take inflation into account. There has been no statement by the administration, other than the statements of February 26, 1982, by President Reagan, Hearings, part 2, at 58, indicating whether the qualitative limitation is being construed literally.

The Peking regime responded to the August testimony of Assistant Secretary Holdridge, to the October remarks of President Reagan, to the February remarks of President Reagan and Secretary Shultz, and to the March arms projection of the administration with essentially the same accusation: the United States is not adhering to promises it made in the communique.

On August 20, 1982, Red China characterized the statements of Secretary Holdridge as "distorted interpretations of certain contents in the communique," and called his refusal to indicate a schedule for arms sales reductions and termination an attempt "to evade U.S. responsibilities." Hearings, at 196–97. In response to the President's October statement that there has been no reversal of our policy toward Taiwan and that Taiwan will get everything they need for their defense, Red China said, "U.S. President Ronald Reagan violated the Sino-United States joint communique in a statement yesterday by making China's peaceful reunification a prerequisite for an end to the sales of U.S. arms to Taiwan." Hearings, at 203. President Reagan's remarks in the February 26, 1983, interview were called "statements deviating from the 17 August Sino-American joint communique." Hearings, part 2, at 63. And on March 18, 1983, it was reported that Red China protested the rising arms sales to Taiwan projected for fiscal years 1983 and 1984. Hearings, part 2, at 63.

The rationale used by the administration both to justify to the Communists the refusal to terminate sales to Taiwan in light of paragraph 6 of the joint communique and to justify to Congress the permissibility of making any statements of intention to reduce arms or to limit their quantity or quality is that the Taiwan Relations Act mandates only that the United States provide the arms needed "to enable Taiwan to maintain a sufficient self-defense capability." (Section 3(b).) The emphasis is placed on the "needs" of Taiwan: this is clear from the statements of President Reagan quoted above and from the statements of Assistant Secretary Holdridge that are cited in the interrogatories of the subcommittee to the Department of State. Hearings, at 118–23 (interrogatories Nos. 1–10), 138–40 (answers Nos. 1–10), and from the testimony of Assistant Secretary Wolfowitz on March 10, 1983, Hearings, part 2, at 7–12.

The argument takes as its point of departure section 3 of the act, which requires the United States to supply Taiwan with the defensive weapons necessary for its security. The "needs of Taiwan" referred to in section 3(b) naturally depend upon the existence and the specific nature of a military threat to Taiwan. If Red China no longer constitutes a military threat to Taiwan—that is, if the so-called Taiwan question were removed—then the defense needs of Taiwan would be correspondingly eliminated.

The statements in paragraph 6 of the joint communique, continues the argument, are premised upon the statements by Red China in paragraph 5. Thus, in implementing the policy of the Taiwan Relations Act, the joint communique represents an understanding that in return for Red China's policy of striving for a peaceful resolution of the Taiwan question, the United States will (1) cap our arms sales qualitatively and quantitatively, (2) reduce the sales gradually, and (3) consider, as one possible alternative, the termination of arms sales to Taiwan. Hearings, at 143 (answer No. 17); Hearings, part 2, at 11–12 (statement of Assistant Secretary Wolfowitz).

Like the accounts offered by the Department to explain the nature of the joint communique, this argument raises several serious questions. The linchpin of the argument is the assertion that the U.S. actions are

premised upon Red China's peaceful policy toward Taiwan, but the Peking regime has repeatedly and unequivocally denied this conditionality. In a statement issued on August 20, 1982, in response to the testimony given by Assistant Secretary Holdridge to the Senate Committee on Foreign Relations and the House Committee on Foreign Affairs, the Red Chinese said:

> Here, it should be pointed out once again that U.S. arms sales to Taiwan and China's efforts for peaceful resolution of the Taiwan issue are two separate questions of an entirely different nature. In what way the Taiwan issue is to be resolved is purely an internal affair of China, brooking no external interference. In the communique, the Chinese Government reiterates its policy of striving to resolve the Taiwan issue peacefully and its stand that the Taiwan issue is China's internal affairs. This can in no way be explained as any commitments China made to the United States, and any misrepresentation of a U.S. stop of arms sales to Taiwan as having to be premised by peaceful resolution of the Taiwan issue will be a continued, premeditated interference in China's internal affairs. Hearings, at 197.

To underscore this interpretation, the Communist Chinese have repeatedly refused to renounce the possibility of using force to unite Taiwan with the mainland. Hearings, at 202 (statement of Huang Hua, Oct. 6, 1982).

According to the Peking view, the U.S. policy statements in paragraph 6 depend upon or have in mind not Red China's commitment to a fundamental policy of peaceful resolution of the Taiwan issue, but the principles governing relations between the two countries, namely, "the principles of respect for each other's sovereignty and territorial integrity and noninterference in each other's internal affairs as embodied in the Shanghai communique and the joint communique on the establishment of diplomatic relations between China and the United States." Hearings, at 194 (statement of the Ministry of Foreign Affairs, Aug. 17, 1982).

Second, the rationale is stated at times in a way that seems to assume that if Red China alone poses no threat to Taiwan or poses a continually diminishing threat, then reduction of American arms sales is justified and is consistent with the Taiwan Relations Act. This, however, ignores the fact that the Congress, in drafting the act, deliberately refused to cast the statutory commitment to the security of Taiwan in the exclusive terms of a threat by mainland China.[9]

Even the statements by the President indicating that the reunification of China would eliminate the need for arms sales to Taiwan because, presumably, Taiwan as an independent nation would no longer exist are not free from difficulties. For one thing, the subcommittee is aware of no documented case of a free nation deciding of its own volition ("peacefully") to become part of an imperial Communist power. Certainly, the past record of Red China's conquests of Tibet and the Paracel Islands,[10] the persistent refusal by Peking officials to

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[9] The debates in committee and on the floor of both Houses of Congress make it quite clear that the principal threat contemplated by the members of Congress was that of the Red Chinese, and the Senate amendments to S. 245 contained explicit references to Red China in this regard. However, in the final version passed by both houses, all reference to specific countries had been eliminated, and the Senate Report indicates that all threats to Taiwan's security were to be covered by the Act. See S. Rept. No. 7, 96th Congress, 1st session 31 (1979); H.R. Rept. No. 26, 96th Congress, 1st session 5–6 (1979).

[10] See Michel Peissel, "The Secret War in Tibet" (Boston, 1972); Hearings, at 40 (statement of A. James Gregor).

rule out the use of force to reunify China, and the repeated assertions by the government and people of Taiwan that they will resist Red Chinese hegemony provide a less than persuasive historical basis for the belief that the peaceful reunification of Taiwan and the mainland is possible in fact or in principle.

Second, the assumption that peaceful reunification entails the end to Taiwan's independent need for defensive arms ignores one of the key documents upon which this administration bases its hope for a peaceful resolution of the problem—the September 30, 1981, "nine point statement." Hearings, at 190. Points 3 and 4 of the "reunification proposal" state:

> 3. After the country is reunified, Taiwan can enjoy a high degree of autonomy as a special administrative region and it can retain its armed forces. The central Government will not interfere with local affairs on Taiwan.
>
> 4. Taiwan's current socioeconomic system will remain unchanged, so will its way of life and its economic and cultural relations with foreign countries. There will be no encroachment on proprietary rights and lawful right of inheritance over private property, houses, land and enterprises or on foreign investments. Hearings, at 190.

This proposal thus contemplates an independent military for Taiwan even after "reunification." But the subcommittee, again referring to the historical record of Red China's reliance upon armed force to conquer the lands which were once a part of imperial China and to the irrefutable record of gross deceit and the resort to armed might demonstrated by the Communist regimes throughout the world, concludes that recent statements such as the nine point proposal and the 1979 New Year's Day "message to compatriots on Taiwan" provide exceedingly long odds against which to gamble the welfare and security of a free, friendly people.

Thus, the interpretation given to the communique by the administration is not free from problems. It may also be noted that if the future Red Chinese attitude and military posture amounts in fact to a lessening of the military threat—actual and potential—toward Taiwan, the development of a corresponding decrease in Taiwan's security needs may justify a gradual reduction as well as a qualitative and quantitative limitation on arms sales consistent with the Taiwan Relations Act. If the communique itself promotes this change in the attitude of Peking, it will have served a desirable goal. However, if the United States reduces and limits the arms sold to Taiwan without referring to the actual or potential threat of Red China and the consequent needs of Taiwan, or if a threat to the security of Taiwan is posed by forces other than Communist China, such action on the part of the United States will violate both the letter and the intent of the act and, therefore, the constitutional separation of powers.

In sum, the interpretation given to the crucial statements in paragraph 6 by the U.S. Government affords grounds for considerable relief regarding the intentions of this administration toward the security of Taiwan and regarding the lawfulness of its arms sales policy in light of the Taiwan Relations Act. The articulated and demonstrated intention of the administration to avoid a literal interpretation of the communique and to continue to provide arms in response to the proven needs of Taiwan represents sound foreign policy as well as legal and constitutional actions if limited to circumstances described above.

VIII. Conclusions

The subcommittee draws the following conclusions on the basis of its investigation into the questions posed by the issuance of the joint communique:

1. The administration has not offered clear and consistent accounts either of the nature of the joint communique or of the legal nature of the policy statements made therein.

2. The apparent meaning of the U.S. policy statements in paragraph 6 of the communique is inconsistent with the policy set forth in the Taiwan Relations Act.

3. The administration, in particular President Reagan, has repeatedly articulated an interpretation of these policy statements which is generally consistent with the Taiwan Relations Act. This interpretation is manifested in recent statements and actions by the administration.

In response to requests by the subcommittee for an Executive order or some similar official statement which memorializes this interpretation of the joint communique, spokesmen for the administration have stated on several occasions that such action is unnecessary in light of the statements which appear in the record of the hearings of this subcommittee.[11] Most recently, Assistant Secretary Wolfowitz reiterated this position in both his testimony before the subcommittee and in a subsequent letter to the chairman.[12] In his letter, the Assistant Secretary said:

> In line with the President's firm commitment to carry out our policy expressed in the joint communique in a manner fully consistent with the TRA, I feel that there is no need for the President to issue an Executive order clarifying the intent of the communique. Such an Executive order would in my opinion be redundant, and therefore unnecessary. Hearings, part 2, at 14.

The subcommittee notes the repeated statements by the administration that the Taiwan Relations Act is the law of the land and that the policy stated in the joint communique is consistent with the act. The subcommittee also notes with approval the repeated statements in recent months of interpretations of the communique that are consistent with the act. In light of these statements and of the finding that the joint communique represents a policy implementation formula that binds only this administration, the subcommittee is persuaded that an Executive order, though still desirable, is not necessary in order to clarify for all interested parties the intended and actual meaning of the communique.

The subcommittee questions, however, the wisdom of the effort of the administration to negotiate and issue this communique on U.S. arms sales. The communique can hardly be characterized as an "understanding" or "modus vivendi" when the parties publicly disagree on the meaning of every significant pronouncement in the document—that is, the nature of Red China's reunification policy toward Taiwan,

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[11] Hearings at 109–10 (response of Legal Adviser Davis Robinson) and at 188 (letter from Assistant Secretary Powell Moore).
[12] Hearings, part 2, at 13.

the meaning of the U.S. statements in paragraph 6, and the conditionality of U.S. arms sales policy upon Communist Chinese policy and actions. Further, the "exceedingly obscure" language of the communique, to quote Professor Gregor, has unnecessarily provoked the American Congress and the American public, the governments of Communist China and of free China, and the governments of our allies and antagonists throughout the world to wonder not only about our arms sales policy toward Taiwan but also about the significance that they may prudently attach to our public pronouncements of foreign policy. The subcommittee concludes that the issuance of the communique was most unfortunate and unwise.

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